

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the License Revocation
of West Metro Recovery Services

ORDER ON MOTION IN LIMINE

This matter came before Administrative Law Judge Kathleen D. Sheehy on the Department's Motion in Limine, filed April 9, 2008. The Licensee filed a response to the motion on April 16, 2008. The motion record closed on April 16, 2008.

Cara M. Hawkinson, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared for the Department of Human Services (Department).

Dennis B. Johnson, Esq., Chestnut & Cambronne, PA, 204 North Star Bank, 4661 Highway 61, White Bear Lake, MN 55110, appeared for West Metro Recovery Services (West Metro or Licensee).

Based on all of the files and proceedings herein, and for the reasons contained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

ORDER

The Department's Motion in Limine is GRANTED in part and DENIED in part, as further explained in the attached Memorandum.

Dated: April 17, 2008

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

West Metro Recovery Services (West Metro) is a licensed provider of outpatient chemical dependency treatment services in Robbinsdale, Minnesota. West Metro also operates a nonprofit organization called Lifetime Transitions, which runs several sober housing units. The sober housing operation is not licensed by any government agency.

Effective January 1, 2005, the rules governing licensed chemical dependency treatment programs were amended. The new rules essentially made outpatient chemical dependency treatment programs subject to the same rules as residential treatment programs. The Department began reviewing the compliance of outpatient programs in 2006, but has not yet completed an initial review of all facilities under the new rules. DHS plans to complete the initial review of 89 more license holders prior to July 1, 2009. In the reviews done to date, DHS has found many programs to be out of compliance with the new rules and has issued correction orders and other adverse actions aimed at achieving and maintaining compliance.

In February 2006, the Department reviewed West Metro's compliance with the rules and alleged a number of violations (33) concerning, among other things, required documentation of employment policies and procedures, failure to submit completed background study forms for staff members, failure to complete initial service plans and comprehensive assessments as required by the rules, and failure to complete and regularly update individual treatment plans, progress notes, and discharge summaries. The Department issued a Correction Order (and likely fined West Metro for the background study violations, although the record is not complete). The Department took no other adverse action against West Metro's license at that time.¹

In the course of investigating an allegation of maltreatment and complaints filed by former clients of West Metro, and in following up on the alleged violations in the February 2006 correction order, the Department found additional evidence of other alleged violations, including allegations that West Metro knowingly allowed a disqualified staff person to have direct contact with persons served by the licensed program; allowed a different disqualified staff person to have direct contact with persons served by the program without continuous direct supervision from April to September 2006, when the Department set aside the disqualification; and failed to submit a background study request for yet another staff person.

Other claimed violations concern the hiring of counselors who were not qualified to provide services, failing to provide required training, permitting too many clients to attend group sessions, storing and dispensing medications contrary to facility policy, and failing to have a physician approve its medical intervention policies. In addition, the Department alleges other violations regarding West Metro's provision of "guest status" housing and treatment services to persons who were not West Metro clients, the use of Lifetime Transition staff members to provide licensed services to West Metro clients,

¹ Notice and Order for Hearing, Ex. 1.

and unauthorized disclosure of confidential client information to other clients, who were performing work on behalf of West Metro staff members.

Furthermore, the Department alleges that West Metro staff persons provided false or misleading information to the Department in the course of these investigations. The Department maintains that a former client's file contains chart entries indicating the client was receiving treatment services during a period of time when the former client claimed to have left the program. In addition, the former client allegedly gave the Department information that, during times when the client was supposed to be receiving treatment services, the client was in actuality assigned to run personal errands for a program administrator. A different former client also maintained that he or she was instructed to sign in for treatment services before leaving to go to work so that West Metro would receive funds sufficient to pay for the client's housing (at Lifetime Transitions).

In April 2007, the Department issued an Order of Revocation, based on alleged violations discovered between the time of the Correction Order and the Order of Revocation.² In July 2007, the Department issued an Amended Order of Revocation alleging another unauthorized disclosure of client information to another client, who in turn provided the confidential files to the Department.³ In October 2007, the Department issued a second amended revocation order, based on allegations (among others) that client files were "doctored" with false or inaccurate information; failure to complete initial service plans, comprehensive assessments, assessment summaries, treatment plans, progress notes, and weekly treatment plan reviews in the manner required by the rules; inadequate documentation of certain employment information and training of employees; failure to have staff persons trained in first aid and CPR when clients were present; and an out-of-date policy manual.⁴ In this proceeding, West Metro appeals the revocation orders.

The Department has filed a motion in limine seeking to preclude West Metro from introducing the following types of evidence, which it maintains are irrelevant, immaterial, and/or unduly repetitious: (1) evidence of negative licensing actions taken with regard to other chemical dependency programs, including correction orders, orders for conditional licenses, revocation orders, and facility responses to negative licensing actions; (2) evidence related to "DHS unfairly applying licensing laws and rules" to West Metro; and (3) evidence related to the manner in which the Department conducted its investigation of West Metro, in comparison to the manner in which the Department conducted investigations of other chemical dependency treatment programs. The Department argues that the only issue for hearing is whether the Department had reasonable cause to revoke West Metro's license, and if so, whether West Metro can demonstrate by a preponderance of the evidence whether it was in full compliance with the statutes and rules governing its license.

² Notice and Order for Hearing, Ex. 2.

³ Notice and Order for Hearing, Ex. 3.

⁴ Memorandum in Support of Motion in Limine, Ex. 3.

In response to the motion, West Metro argues that it is entitled to offer evidence that revocation is a sanction that is “disproportionate to the standard policy of the agency.” It would like to offer evidence that the Department has issued correction orders finding similar numbers of violations at chemical dependency programs, whose licenses presumably have not been revoked. West Metro does not argue that the Department is selectively enforcing its rules against West Metro; it appears to argue that West Metro has been singled out for revocation, when many other treatment programs have had similar problems but have been allowed to update and refine their policies to achieve compliance, and while many others have yet to undergo a review under the new rules. Similarly, West Metro argues that evidence related to the manner in which the Department conducted its investigation “may be relevant or probative of the standards of the Department as they have evolved through the, as yet incomplete, implementation of Rule 31.”

This matter is set for hearing on April 22-25, 2007. The parties anticipate calling more than 20 witnesses and offering hundreds of pages of exhibits, not including the evidence that is at issue in this motion. Both parties have requested that the Administrative Law Judge rule on this motion prior to the start of the hearing.

Legal Standard

The Commissioner may issue a correction order and an order of conditional licensure if the Commissioner finds that a license holder has failed to comply with an applicable law or rule, but the failure to comply does not imminently endanger the health, safety, or rights of persons served by the program.⁵ The Commissioner may propose to suspend or revoke the license, impose a fine, or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule, or if a license holder gives false or misleading information to the Commissioner during an investigation. When applying these sanctions, the Commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.⁶

At a hearing regarding a licensing sanction, the Commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the Commissioner demonstrates that reasonable cause existed, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the commissioner alleges the license holder violated, at the time that the commissioner alleges the violations of law or rules occurred.

Contrary to the Department’s argument that the issues are limited to the Department’s showing of reasonable cause and the Licensee’s proof of compliance, the

⁵ Minn. Stat. § 245A.06, subd. 1 (2006).

⁶ Minn. Stat. § 245A.07, subd. 1 & 3(a) (2006).

propriety of the revocation is at issue here. Evidence pertinent to the standard for revocation—the nature, chronicity, or severity of the violations and the impact on the health, safety, or rights of persons served by the program—would be admissible, assuming it is not objectionable on some other basis. Although neither party has sufficiently identified the evidence that would be subject to this order, the Administrative Law Judge will attempt to give the parties some guidance as to the evidentiary standards that will be applied during the hearing.

Evidence of Negative Licensing Actions Taken with Regard to Other Chemical Dependency Programs

West Metro argues that comparative evidence may be relevant in determining the severity of the sanction and should not be excluded *per se*. It contends that the weight, sufficiency, or significance of this evidence is for the Administrative Law Judge to determine, but that it is relevant to “establish the context under which [West Metro] was licensed, reviewed, and subsequently sanctioned.” The Administrative Law Judge is not entirely certain what evidence West Metro seeks to offer. It has attached to its responsive memorandum the cover pages of licensing reviews for several other facilities found to have similar numbers of violations as West Metro in the February 2006 Correction Order, but there is no evidence as to how the Department evaluated the nature, chronicity, and severity of those violations or of any negative licensing actions taken in response to those violations.

The agency is the policymaker with regard to whether a particular violation or combination of violations is severe enough to warrant suspension or revocation, and its determination is entitled to some deference. Although West Metro has not argued that there is a constitutional basis for admission of this type of evidence, the courts have generally held that agencies have broad discretion in deciding whom to prosecute, and the conscious exercise of reasonable selectivity in enforcement is not constitutionally suspect.⁷ The unequal application of a statute by state officers is not a denial of equal protection unless the challenging party shows by a clear preponderance that there was intentional or purposeful discrimination.⁸

West Metro has made clear that it is not challenging the licensing decision on the basis of “unequal enforcement.” It is also clear, and the Administrative Law Judge does not believe that the Department would dispute, that many outpatient chemical dependency programs have had difficulty changing their operations to comply with the new rules. Nor would the Department be likely to dispute that it has issued many correction orders alleging multiple violations to other providers to aid them in achieving compliance. This might be relevant background information, but it would not be an efficient use of hearing time to wade through hundreds of pages of documents pertaining to violations committed by other providers, when there is barely enough time next week to address the violations allegedly committed by West Metro. The focus in

⁷ See *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

⁸ See *Draganosky v. Minnesota Board of Psychology*, 367 N.W.2d 521, 526 (Minn. 1985); *State v. Ri-Mel, Inc.*, 417 N.W.2d 102, 107-08 (Minn. App. 1987).

this hearing should properly be on West Metro, its compliance with the rules, and the propriety of the decision to revoke its license.

To the extent that West Metro's offer of proof consists of the correction orders attached to its Memorandum, the Administrative Law Judge would find that evidence to be collateral and irrelevant without some showing on the record that the Department came to different conclusions about the nature or severity of the same types of violations or combinations thereof, and took less severe licensing action with regard to other programs that were in truly comparable situations. The Department's motion to preclude this type of evidence at this time is GRANTED; however, counsel for West Metro will be allowed reasonable latitude in examining Department witnesses about the consistency of the Department's treatment of the types of violations at issue in this case. If counsel can make the requisite showing, and offers narrowly crafted impeachment evidence that is not collateral, the Administrative Law Judge would be willing to reconsider this ruling during the hearing.

Evidence that "DHS Unfairly Applied Licensing Laws and Rules" to West Metro and Evidence Related to the Manner in which the Department Conducted its Investigation of West Metro.

Neither party has specified what evidence would be included within these categories. Because the Department has not provided any examples of the type of evidence it is seeking to preclude, and because the Licensee has not provided any examples of what it would seek to offer, the Administrative Law Judge cannot make any definitive ruling on what evidence would or would not be admissible. The Department's motion in limine as to these categories of evidence is accordingly DENIED. But the licensing laws and rules are applicable to all licensees, and it is probably safe to say that most licensees facing revocation of any type of license have some belief that the rules have been applied unfairly to them. And chemical dependency treatment programs are businesses that are highly regulated because their clients are both vulnerable and difficult to manage due to the nature of their addiction. Evidence that the Licensee believes it is unfair of the Department to apply laws and rules that are on the books, or that intensive scrutiny for compliance with those laws and rules is intrusive or unjustified, would not be probative of any issue in this case.

K.D.S.